

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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RAMPARTS, INC., a Nevada Corporation,
d/b/a Luxor Hotel and Casino,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE
COMPANY, a California Corporation; THE
AMERICAN INSURANCE COMPANY, an
unknown entity; and DOES 1-50, inclusive,

Defendants.

Case No.: 2:09-cv-00371-RLH-LRL

ORDER

(Motion for Liquidation of
Damages-#119;
Motion for Attorneys Fees-#128;
Motion to Amend Judgment-#129;
Motion for Sanctions-#130;
Motion for Sanctions-#131)

Before the Court is Plaintiff Ramparts, Inc.'s ("Luxor") **Motion for the Liquidation of Damages Awarded by the Jury** (#119, filed June 20, 2011). The Court has also considered Defendant American Insurance Company's ("American Insurance") Opposition (#144, filed July 7, 2011), and Luxor's Reply (#150, filed July 18, 2011).

Also before the Court is Luxor's **Motion for Attorney's Fees and Costs** (#128, filed June 20, 2011) for American Insurance's failure to obtain a judgment more favorable than Luxor's offer of judgment. The Court has also considered American Insurance's Opposition (#145, filed July 7, 2011), Luxor's Reply (#151, filed July 18, 2011), and American Insurance's Sur-Reply (#157, filed July 22, 2011).

1 Also before the Court is Luxor's **Motion to Amend Judgment to Include Pre-**
2 **and Post-Judgment Interest** (#129, filed June 20, 2011). The Court has also considered
3 American Insurance's Opposition (#143, filed July 7, 2011), and Luxor's Reply (Dkt. #152, filed
4 July 18, 2011).

5 Also before the Court is Luxor's **Motion for Sanctions** (#130, filed June 20, 2011)
6 for American Insurance's failure to admit request for admission's 1, 3, 4, and 8 later established to
7 be true. The Court has also considered American Insurance's Opposition (#147, filed July 7,
8 2011), and Luxor's Reply (#153, filed July 18, 2011).

9 Finally, before the Court is Luxor's **Motion for Sanctions** (#131, filed June 20,
10 2011) for American Insurance's failure to admit request for admission's 9 and 10 later established
11 to be true. The Court has also considered American Insurance's Opposition (#146, filed July 7,
12 2011), and Luxor's Reply (#154, filed July 18, 2011).

13 BACKGROUND

14 Luxor owns and operates the Luxor Hotel & Casino in Las Vegas. In 2006, Luxor
15 entered into a lease agreement with Heptagon, a non-party to this action, in which Heptagon
16 agreed to construct, develop, and operate a restaurant in the Luxor. Heptagon first insured the
17 restaurant through Fireman's Fund Insurance Company ("Fireman's Fund") and then through
18 American Insurance.

19 On February 26, 2008, while the American Insurance policy was in effect, part of
20 the restaurant became overloaded with people and the restaurant floor collapsed, causing structural
21 damage to the Luxor. Luxor then submitted a claim to both Fireman's Fund and American
22 Insurance as an additional insured under Heptagon's policy. Both Fireman's Fund and American
23 Insurance denied Luxor's claims.

24 In January 2009, Luxor filed suit against Fireman's Fund and American Insurance
25 asserting claims for breach of contract, bad faith, unfair insurance practices, as well as several
26 claims for declaratory relief. The Court dismissed Fireman's Fund from the case and disposed of

1 all of Luxor's claims on summary judgment with exception to two of its claims for declaratory
2 relief. (Dkt. #30, Order, June 7, 2010). The Court also granted summary judgment in favor of
3 Luxor for its Unfair Insurance Practices claim, finding that American Insurance violated NRS
4 686A.310 of the Unfair Insurance Practices Act (the "Act"). (*Id.*).

5 The case proceeded to trial and on May 26, 2011, the jury rendered a verdict in
6 favor of Luxor. (Dkt. #104, Verdict). Specifically, the jury found that Luxor suffered damages
7 under the Property of Others clause in the American Insurance policy in the amount of \$1,200,000.
8 (*Id.*). The jury also found that American Insurance's failure to comply with the Unfair Insurance
9 Practices Act necessitated Luxor's filing the lawsuit. (*Id.*). The Clerk of Court therefore entered
10 judgment in favor of Luxor and against Fireman's Fund and American Insurance in the amount of
11 \$1,200,000. However, on June 10, the Court issued a *Nunc Pro Tunc* correction of judgment
12 (#117) removing Fireman's Fund from the judgment because the Court had previously dismissed
13 Fireman's Fund from the case. In the *Nunc Pro Tunc* order, the Court also reduced the amount of
14 damages to \$50,000 because the Property of Others clause was subject to a \$50,000 sublimit.

15 Luxor subsequently filed five motions, including a motion to amend the *Nunc Pro*
16 *Tunc* judgment under Rule 59(e) of the Federal Rules of Civil Procedure, a motion for attorney's
17 fees, a motion for liquidation of damages, and two motions for sanctions. Luxor then appealed the
18 case to the Ninth Circuit Court of Appeals, raising three principal issues: (1) whether the Court
19 properly disposed of some of Luxor's claims on summary judgment; (2) whether the Court
20 properly dismissed Luxor's punitive damages claim during trial; and (3) whether the Court
21 properly reduced Luxor's damages from \$1,200,000 to \$50,000. The Ninth Circuit, however,
22 issued an order noting that Luxor's appeal was filed while its Rule 59(e) motion was still pending.
23 (Dkt. #158, Order of USCA, July 28, 2011). Pursuant to Rule 4(a) of the Federal Rules of
24 Appellate Procedure, an appeal is ineffective until that motion is disposed of by the Court. (*Id.*).
25 For the reasons discussed below, the Court grants Luxor's motions to amend and for liquidation of
26 damages in part and denies them in part, and denies their other motions.

DISCUSSION

I. Motion for Liquidation of Damages

As stated above, the Court granted summary judgment in favor of Luxor for its Unfair Insurance Practices claim, finding that American Insurance violated the Unfair Insurance Practices Act (the “Act”), NRS 686A.310. (Dkt. #30, Order). Also, the jury found that American Insurance’s failure to comply with the Act necessitated Luxor’s filing the lawsuit. (Dkt. #104, Verdict). However, the jury was not asked to decide Luxor’s damages for this claim; the Court reserved that determination for itself. Accordingly, Luxor filed this motion asking the Court to award damages for American Insurance’s violation of the Act.

The Act states that “an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.” NRS 686A.310(2). Luxor asks the Court to award it the attorney’s fees it incurred in this lawsuit (\$594,194.75) as damages for American Insurance’s violation. However, Luxor’s \$594,194.75 in attorney’s fees are not the proper measurement of damages for this claim because Luxor would have pursued its claims under the American Insurance policy even if American Insurance did not violate the Act, thereby incurring these fees regardless. Further, the Act itself does not state that attorney’s fees are the proper measurement of damages. The Court finds that \$10,000 is sufficient both to compensate Luxor for the damages it sustained for this claim and to discourage American Insurance from violating the statute in the future and awards Luxor that amount for American Insurance’s violation of the Act.

II. Motion to Amend Judgment

a. Legal Standard

“Rule 59(e) provides a mechanism by which a trial judge may alter, amend, or vacate a judgment.” *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1249 (9th Cir. 1982), *overruled on other grounds by Mayle v. Felix*, 545 U.S. 644, 657–59 (2005). A party may use a Rule 59(e) motion to request that a court amend a judgment to include

1 prejudgment interest. *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 175 (1989). “A motion to
 2 alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.”
 3 Fed. R. Civ. P. 59(e). Luxor’s motion to amend asks the Court to amend the *Nunc Pro Tunc*
 4 correction of judgment (#117) to include pre- and post-judgment interest.

5 **b. Analysis**

6 **1. Pre-Judgment Interest for Damages under the Property of Others**
 7 **Clause**

8 Luxor argues that it is entitled to pre-judgment interest for the damages it sustained
 9 under the Property of Others clause in the American Insurance policy. In a diversity action, such
 10 as this, state law determines the availability of prejudgment interest. In Nevada, NRS 99.040(1) is
 11 the prejudgment interest statute that governs contract cases. *Kerala Properties, Inc. v. Familian*,
 12 137 P.3d 1146, 1147 (Nev. 2006). Under NRS 99.040(1), the proper prejudgment interest rate is
 13 the prime rate in effect at the largest bank in Nevada on the date the contract was signed, plus 2
 14 percent. NRS 99.040(1); *Kerala*, 137 P.3d at 1148. Prejudgment “interest is recoverable as a
 15 matter of right upon money due from contracts.” *Schoepe v. Pacific Silver Corp.*, 893 P.2d 388,
 16 390 (Nev. 1995). “[T]hree items must be determined to enable the trial court to make an
 17 appropriate award of interest: (1) the rate of interest; (2) the time when it commences to run; and
 18 (3) the amount of money to which the rate must be applied.” *Kerala*, 137 P.3d at 1148–49
 19 (quoting *Schoepe*, 893 P.2d at 389).

20 American Insurance argues that NRS 17.130—not NRS 99.040(1)—is the
 21 applicable prejudgment interest statute. The Court disagrees. NRS 17.130 is “the statute
 22 governing prejudgment interest in *noncontract* actions” *Kerala*, 137 P.3d at 1148 (emphasis
 23 added), and contrary to American Insurance’s assertions, this is a contract action. Therefore,
 24 because prejudgment interest is mandatory, *Schoepe*, 893 P.2d at 390, the Court will determine the
 25 amount due to Luxor in this case.

26 ///

1 First, the Court must determine the proper rate of interest. *Kerala*, 137 P.3d at
2 1148. As stated above, the proper prejudgment interest rate is the prime rate in effect at the largest
3 bank in Nevada on the date the contract was signed, plus 2 percent. NRS 99.040(1); *Kerala*, 137
4 P.3d at 1148. Both parties agree that the interest rate is 10.25%. The Court must therefore
5 determine on which date the interest in this case began to run. The statute states that interest
6 begins to run “from the time [the money] becomes due.” NRS 99.040(1). The Court finds that the
7 date on which the money became due was August 22, 2008, the date on which Luxor submitted a
8 claim under Heptagon’s original Fireman’s Fund insurance policy and the subsequent American
9 Insurance policy. Accordingly, because the Court entered judgment in this case on June 6, 2011,
10 the interest period totals 1,019 days.

11 Finally, the Court must determine the amount of damages to which the interest rate
12 is to be applied. The Court finds that because the Property of Others clause was subject to a
13 \$50,000 sublimit, that is the proper amount to which the 10.25% interest rate be applied.
14 Therefore, using the appropriate method for calculating prejudgment interest as established in
15 *Albios v. Horizon Cmty., Inc.*, 132 P.3d 1022, 1033 n. 39 (Nev. 2006), the Court finds that Luxor
16 is entitled to \$14,266.00 in prejudgment interest for the damages it sustained under the Property of
17 Others clause.

18 2. Pre-Judgment Interest for Damages under the Unfair Insurance 19 Practices Act

20 Luxor also argues that it is entitled to pre-judgment interest for any damages it is
21 awarded for American Insurance’s NRS 686A.310 violation. As discussed above, the Court is
22 awarding Luxor \$10,000 because that is what the Court finds Luxor’s damages to be as a result of
23 the violation, and because such an award is sufficient to discourage American Insurance from
24 engaging in such conduct in the future. Because Luxor’s claim under the Act is not based upon a
25 contract, the Court finds that the pre-judgement interest computation in NRS 17.130 applies to
26 these damages. Under NRS 17.130, pre-judgement interest runs from “the time of service of the

summons and complaint until” the judgment is entered. The interest rate applicable under NRS 17.130(1) is “the prime rate at the largest bank in Nevada . . . on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent.” NRS 17.130(2).

American Insurance was served with the summons and complaint on January 26, 2009, and the Clerk of Court entered judgment on June 6, 2011—a period of 862 days. The proper interest rate under NRS 17.130(2) is 5.25%. Therefore, using the appropriate method for calculating pre-judgment interest as established in *Albios*, 132 P.3d at 1033 n. 39, the Court finds that Luxor is entitled to \$1,241.28 in pre-judgment interest for the damages it sustained under NRS 686A.310 of the Nevada Unfair Insurance Practices Act.

3. Post-Judgment Interest

In a diversity action, federal law governs the award of post-judgment interest. *American Tel. Co. v. United Computer Sys., Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996). Post-judgment interest “shall be allowed on any money judgment in a civil case recovered in a district court . . . [and] shall be calculated from the date of the entry of judgment” 28 U.S.C. § 1961. “Thus, it is mandatory that postjudgment interest be allowed where a money judgment has been recovered in a civil case.” *Lake Tahoe Sailboat Sales & Charter, Inc. v. Douglas County*, 562 F. Supp. 523, 524 (D. Nev. 1983). Post-judgment interest accrues on attorney’s fees, *Friend v. Kolodziejczak*, 72 F.3d 1386, 1391–92 (9th Cir. 1995), and on prejudgment interest. *Air Separation, Inc. v. Underwriters at Lloyd’s of London*, 45 F.3d 288, 290–91 (9th Cir. 1994).

In this case, Luxor received a money judgment for attorney’s fees as an element of damages to their unfair insurance practices claim. That is, the jury found that American Insurance’s failure to comply with the Act necessitated Luxor’s filing this lawsuit. (Dkt. #104, Jury Verdict), and as damages for American Insurance’s conduct Luxor is entitled to attorney’s fees. (Dkt. #110, Jury Instructions, No. 15). In addition, the jury returned a verdict in Luxor’s favor for their claim for declaratory relief under the Property of Others clause of the American Insurance policy. The Court has reduced the amount of damages awarded to Luxor under that

1 clause to \$50,000. Accordingly, Luxor is entitled to post-judgment interest both for their \$10,000
2 in damages under the Unfair Insurance Practices Act and their \$50,000 in damages under the
3 Property of Others clause. Finally, Luxor is awarded post-judgment interest on the pre-judgment
4 interest that has accrued from their Property of Others and Unfair Insurance Practices claims.

5 **c. Summary**

6 The Court therefore grants Luxor's motion to amend judgment to include
7 prejudgment interest, as follows: Luxor is awarded prejudgment interest in the amount of
8 \$14,266.00 on its damages under the Property of Others clause, and in the amount of \$1,241.28 on
9 its damages under the Unfair Insurance Practices Act. Luxor is also awarded post-judgment
10 interest both on their \$10,000 in damages under the Unfair Insurance Practices Act and their
11 \$50,000 in damages under the Property of Others clause. Finally, Luxor is awarded post-judgment
12 interest on the pre-judgment interest that has accrued for their Property of Others and Unfair
13 Insurance Practices claims.

14 **III. Motion for Attorney's Fees**

15 Luxor also asks the Court to award it attorney's fees under NRS 17.115 and Rule
16 68 of the Nevada Rules of Civil Procedure, which state that if an offeree rejects an offer and does
17 not obtain a judgment more favorable than the judgment, the offeree must pay the offeror's post-
18 offer attorney's fees. Luxor argues that it made American Insurance an offer on November 29,
19 2010, in the amount of \$325,000, which American Insurance denied. Luxor also argues that
20 because the jury returned a verdict in favor of Luxor, American Insurance obtained a judgment less
21 favorable than the offer. Accordingly, Luxor argues that American Insurance should pay the
22 attorney's fees Luxor incurred after November 29, 2010.

23 However, the Court finds that pursuant to Rule 68 of the Federal Rules of Civil
24 Procedure Luxor is not entitled to any attorney's fees after November 17, 2010. Rule 68 is the
25 federal version of the state rules Luxor relies on. Under Rule 68, "[i]f the judgment that the
26 offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the

costs incurred after the offer was made.” Fed. R. Civ. P. 68(d); *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). Luxor forgets that the judgment it obtained was only for \$50,000, and that it received an offer of judgment from American Insurance and Fireman’s Fund in the amount of \$75,000 on November 17, 2010. (Dkt. #144, Opposition, Ex. 2). Therefore, Luxor is not entitled to recover the attorney’s fees it incurred after that date.

Luxor argues that because the offer of judgment was a joint offer—that is, an offer from both American Insurance and Fireman’s Fund—it is “not comparable to, and cannot be evaluated against the judgement obtained at trial against only” American Insurance. (#150, Reply, July 18, 2011). According to Luxor, American Insurance would only be responsible for paying a portion of the \$75,000 offer because it was jointly made with Fireman’s Fund. Thus, because Luxor’s judgment was obtained only against American Insurance, the full \$75,000 offer amount should not be used to determine whether Luxor’s judgment was less favorable than the offer under Rule 68. The Court disagrees. The offer of judgment was extended to Luxor after the Court had dismissed Fireman’s Fund from the case on summary judgment. (Dkt. #30, Order, June 6, 2010). Therefore, it was reasonable for Luxor to presume that American Insurance would be responsible for the entire \$75,000. Accordingly, Luxor is not entitled to recover attorney’s fees after November 17, 2010, which includes the attorney’s fees it incurred after its offer of judgment from November 29, 2010.

IV. Motions for Sanctions

a. Legal Standard

Luxor argues that it is entitled to attorney’s fees as sanctions against American Insurance for failure to admit several requests for admissions. Rule 37(c)(2) states:

If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney’s fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

- 1 (B) the admission sought was of no substantial importance;
2 (C) the party failing to admit had a reasonable ground to believe that it might
3 prevail on the matter; or
(D) there was other good reason for the failure to admit.

4 Luxor claims that American Insurance failed to admit six of Luxor's requests for admission that it
5 later proved. The Court will discuss each in turn.

6 **b. Analysis**

7 **1. Request for Admission No. 1**

8 Luxor's first request for admission asks American Insurance to "[a]dmit that
9 plaintiff Ramparts, Inc. is an additional insured under the AIC policies." American Insurance
10 answered by checking the "Deny" box and then objecting on the grounds that the request is vague.
11 American Insurance also stated that Luxor was an additional insured under the Fireman's Fund
12 policy and "added" as an additional insured under the American Insurance policy after "the date of
13 loss."

14 The Court finds that American Insurance should not be sanctioned for this request
15 for admission because the admission sought is not substantially important. Although the Court
16 held that Luxor was an additional insured under the American Insurance policy on the date of loss,
17 the Court limited Luxor's coverage to the extent it seeks indemnification for liability caused by
18 Heptagon's acts or omissions. Therefore, because Luxor did not bring a claim for indemnification
19 its status as an additional insured is not important to their claims that survived summary judgment.
20 Therefore, the Court refuses to sanction American Insurance for this request for admission.

21 **2. Requests for Admission Nos. 3, 4 & 8**

22 Luxor's third, fourth, and eighth requests for admission all relate to American
23 Insurance's liability under the Unfair Insurance Practices Act. Luxor argues that because the Court
24 ultimately found that American Insurance violated that act they should be sanctioned for not
25 admitting the facts requested. However, as discussed above, Luxor is already receiving damages
26 for American Insurance's violation of the statute. The purpose of the damages Luxor obtained for

1 American Insurance's violation is, in effect, to sanction American Insurance. Obtaining attorney's
2 fees as sanctions in addition to those damages is duplicative. Therefore, the Court refuses to
3 sanction American Insurance for requests 3, 4, and 8 as well.

4 **3. Requests for Admission Nos. 9 and 10**

5 Luxor's ninth and tenth requests for admission essentially ask American Insurance
6 to admit that Luxor is entitled to coverage under the American Insurance policy for damages it
7 suffered as a result of the restaurant's collapse. American Insurance denied both requests. The
8 Court finds that sanctions are improper for these requests because they are vague and because
9 American Insurance had reasonable grounds to believe it would prevail on the policy claims.
10 Whether American Insurance was liable under the policy for Luxor's costs and losses was the
11 central issue to be resolved by the jury at trial. Although American Insurance did not prevail at
12 trial, the "true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted
13 reasonably in believing that he might prevail." Fed. R. Civ. P. 37(c), Advisory Committee Notes
14 on 1970 Amendment. And the Court finds that American Insurance reasonably believed that it
15 could have prevailed on this issue at trial. Therefore, the Court refuses to sanction American
16 Insurance for requests 9 and 10.

17 **CONCLUSION**

18 Accordingly, and for good cause appearing,

19 IT IS HEREBY ORDERED that Luxor's Motion for Liquidation of Damages
20 (#115) is GRANTED in part and DENIED in part. The Court awards Luxor \$10,000 as damages
21 for its Nevada Unfair Practices Act claim.

22 IT IS FURTHER ORDERED that Luxor's Motion for Attorney's Fees (#128) is
23 DENIED.

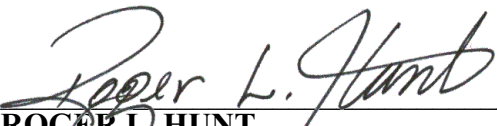
24 IT IS FURTHER ORDERED that Luxor's Motion to Amend Judgment (#129) is
25 GRANTED in part and DENIED in part. Luxor is awarded prejudgment interest in the amount of
26 \$14,266.00 for its damages under the Property of Others clause, and in the amount of \$1,241.28

1 for its damages under the Unfair Insurance Practices Act. Luxor is also awarded post-judgment
2 interest both for their \$10,000 in damages under the Unfair Insurance Practices Act and their
3 \$50,000 in damages under the Property of Others clause. Finally, Luxor is awarded post-judgment
4 interest for the pre-judgment interest that has accrued for their Property of Others and Unfair
5 Insurance Practices claims.

6 IT IS FURTHER ORDERED that Luxor's Motion for Sanctions (#130) is
7 DENIED.

8 IT IS FURTHER ORDERED that Luxor's Motion for Sanctions (#131) is
9 DENIED.

10 Dated: August 22, 2011

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13 **ROGER L. HUNT**
14 **United States District Judge**
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